

# Protecting pre-paying buyers of unascertained goods: Why ‘pay before you go’ may be bad for you

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**Abstract** This paper shows that the traditional equitable doctrine, which protected the rights of a prepaid buyer of future or unascertained goods, was wrongly perceived as being overruled by the judgment of a single Court of Appeal judge. What followed, however, was considerable judicial reluctance by English courts to remedy this error. The article examines various legislative and judicial approaches from major common law jurisdictions around the world that purport to lessen the potential for injustice created by this judicial caution. Yet despite legislative intervention in England to provide limited remedies, there has been a marked reluctance elsewhere to produce the necessary radical reform suggested by the Law Reform Commission of Ontario. The position in Ireland is examined and the authors note that the time may be ripe for a reconsideration of the current statutory provisions in that jurisdiction.

## Introduction

As the primary objective of a contract for the sale of goods is to effect the passing of property in the goods in return for some consideration, the ability to pass that property and the time of the passing of that property are very important. While these matters may give rise to certain complexities where specific goods are concerned, they become more intricate when unascertained or future goods are involved.

There are two aspects to this issue. On the one hand there is the potential financial loss for a prepaying buyer of goods in the event

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that the seller is declared insolvent. On the other hand some certainty about the passing of property is necessary for any putative act of borrowing and the giving of security by the buyer over such unascertained goods. Ensuring that the passing of property is effected becomes more complicated when the contract goods are commingled and there is more than one seller but this article does not include within its ambit a detailed examination of commingled goods.

This article first seeks in Part I to define the concept of specific, future or unascertained goods in terms of a spectrum, based on the time at which the contract goods are to be identified. If that is the case, then the justification for a resolute difference between treatments of contracts for specific goods and those for future/unascertained goods becomes less sustainable. Then it will be shown in Part II that the traditional equitable doctrine which protected the rights of a prepaid buyer of future/unascertained goods was wrongly perceived as being overruled by the judgment of a single Court of Appeal judge. Part III of the article highlights judicial reluctance to remedy this error, despite some precedents that showed a relaxed approach to legislative appropriation in contracts for future/unascertained goods. Part IV also examines the legislative intervention in England, intended to provide some relief from the clear injustice created. Finally, Part V constitutes a comparative analysis of approaches taken in various common law countries, some of which show a reluctance by both judiciary and legislature to make even those marginal alterations made in England.

## I. Specific, Future and Unascertained Goods

Future goods can be defined as those not in existence at the time the contract was made. The term can also be extended to include those goods that are not the property of the seller at the time the contract was made, since though such a contract may actually appear to relate to specific goods, *inter partes* the seller is purporting to sell something which does not yet exist, namely his ownership of the subject-matter of the contract. Unascertained goods arise where, at the time of making the contract of sale, the precise goods being sold cannot be specifically identified. This classification of unascertained goods can be further refined into generic goods and quasi-specific goods. Generic goods can be defined as those having particular characteristics in common with other such goods made for sale to others. Quasi-specific goods can be defined as those that have particular characteristics but are to be taken from a specified larger bulk or quantity that can be identified.<sup>1</sup> Although the distinction can be useful, there is no bright line that separates generic from quasi-specific

1 R. Goode, *Commercial Law*, 2nd edn (Butterworths: London, 1995) 215.

goods. It will depend on the specificity with which the particular characteristics are detailed in the contract.

Further analysis leads to the logical conclusion that specific, future and unascertained goods (both quasi-specific and generic) are simply different elements of the same spectrum in terms of identification of the subject-matter of the contract. First, quasi-specific goods may be specified with such accuracy that the contract is essentially a contract for specified goods. On the other hand, the particulars may be so vague as to render it closer to a contract for generic goods, or even future goods. For example, how should one classify a contract with a car dealership for the purchase of a Toyota Camry? Car manufacturers now employ on-demand production techniques, so such a contract may amount to a contract for a good not yet in existence, i.e. a future good, but one which will be manufactured next week. Or it could be classified as a generic good, that is, any Toyota Camry which is in existence, and that might be sourced from anywhere. Or it could be classified as a quasi-specific good, that is, a good from the overall stock of Toyota Camrys in the dealership. The significant factor is that such a contract, no matter how we classify the goods, differs in quality from one where the consumer enters into a contract to purchase the Toyota he or she has just taken for a test drive.

Second, at some stage even unascertained or future goods must become specific goods: the issue is timing. In a contract for the sale of specific goods, identification of the subject-matter of the contract is contemporaneous with the making of the contract. In contracts for sale of future or unascertained goods, identification takes place, if at all, only after the contract has been made. However, the expectation of the parties in contracts for future or unascertained goods is that those goods should become specific at some point. Thus we can usefully distinguish between such contracts and a contract of chance.<sup>2</sup> In a contract of chance, the parties understand that the future or unascertained goods may never become specific. Indeed there is an argument that such contracts are not contracts for the sale of goods, but are essentially wagers, even if they do not technically fall foul of the public policy rules on gaming.<sup>3</sup>

Third, the common law also distinguished between future/unascertained goods and what was termed potential property. Potential property refers to those goods which, though not yet in existence, were the natural produce or expected increase of that which was already the seller's property. The most obvious example of this would be the sale of hay that was not yet ready for harvest. As far as the law was concerned, such sales constituted an immediate sale of specific goods.<sup>4</sup> In *H.R. & S. Sainsbury Ltd v Street*<sup>5</sup> a farmer entered into an

<sup>2</sup> Sometimes referred to as the sale of a spes.

<sup>3</sup> *Ellesere v Wallace* [1929] Ch 1.

<sup>4</sup> *Howell v Coupland* (1876) 1 QBD 258 (CA).

<sup>5</sup> [1972] 3 All ER 1127.

agreement with some corn merchants for the sale of feed barley to be grown on his land that summer. Both parties agreed that the harvest would be in the order of 275 tons. In fact the harvest fell well short at 140 tons. The farmer refused to deliver this harvest to the buyer and the buyer pursued an action for non-delivery under the contract. The court held that at common law the farmer was obliged to deliver the harvest to the buyer, even where the harvest fell short of that which the parties had agreed.<sup>6</sup> The farmer was excused with respect to the shortfall but essentially the harvest had passed at the making of the contract. The case is explicable if one views the differences between specific and future/unascertained goods as one of degree and not substance. In potential property, one does not have to wait for the harvest to identify the contract goods since in essence the contract relates to specific goods not yet certain.

It is submitted therefore that the only meaningful distinction is that between contracts for specific goods and contracts for non-specific goods (future goods or unascertained goods). That being the case, it is now appropriate to examine the common law position with respect to non-specific goods on the basis that common rules apply equally to future and to unascertained goods.

## II. The Common Law

Traditionally, the law relating to future goods differed between common law and equity. Under common law, the mere coming into being of the future goods had no legal impact, whereas this was not the case in equity. In *Holroyd v Marshall*<sup>7</sup> it was held that the buyer acquired an equitable right to the goods as soon as they came into existence. Such right was superior to all other rights save that of a purchaser for value without notice of the buyer's prior equitable right. All that was required was that the goods which came into existence matched those described under the contract in question.<sup>8</sup>

The passing of the Sale of Goods Act 1893 appears to have put this approach into question, although the reasons why are not fully clear. In *Re Wait*,<sup>9</sup> Wait had bought a quantity of wheat to be transported on a particular ship. He resold one half of that quantity of wheat to a buyer who paid in advance. Before the ship delivered the wheat, Wait was declared bankrupt. The majority of the Court of Appeal held that the buyer was unable to claim any part of the ship's cargo of wheat because he owned no part of that cargo. The court was asked by counsel whether the power under s. 52 of the Sale of Goods Act 1893 to order specific performance of a contract for the sale of specific or

<sup>6</sup> It should be noted the court held that the 1893 Act did not alter the common law position in this situation.

<sup>7</sup> (1862) 11 ER 999 (HL).

<sup>8</sup> *Tailby v Official Receiver* (1888) 13 App Cas 523 (HL).

<sup>9</sup> *Re Wait* [1927] 1 Ch 606.

ascertained goods could be exercised in this case. The Court of Appeal held that it could not grant an order for specific performance of the contract because the purchaser's wheat was not specific or ascertained. The buyer had agreed to buy unascertained goods that had not been separated from the bulk and identified with his contract. As the goods were unascertained, s. 16 prevented property in those goods passing to the buyer.<sup>10</sup> For the part of a bulk being sold to be ascertained for the purposes of s. 16, it seems it must be physically separated from the bulk.

The case centred on the statutory power<sup>11</sup> of the court to order specific performance of a contract where the goods were specific or ascertained. The trustee in bankruptcy asserted that the goods in question were future goods and were never 'unconditionally appropriated'<sup>12</sup> under s. 18, Rule 5 so as to make the property in them pass to sub-purchasers, the assertion being that the goods were therefore neither specific nor ascertained. If he had succeeded, the goods would have formed part of the pool of assets available in bankruptcy.

Lord Hanworth MR said, 'there was no ascertainment or identification' of the 500 tons contracted for by the buyer from among the total tonnage on board the vessel.<sup>13</sup> In arriving at his judgment, Lord Hanworth relied on *Hayman & Son v M'Lintock*<sup>14</sup> and the emphasis by Lord Maclaren in that case on the fact that 'as the sacks [of flour] were neither numbered, nor marked, nor put into receptacles, nor ascertained in such a way as to distinguish them from other flour', no transfer of ownership had been effected to sub-purchasers in that case. Relying on that and other decisions Lord Hanworth concluded that it was 'not possible to hold that the 500 tons of wheat ex motor vessel *Challenger* were specific or ascertained goods'.<sup>15</sup> Lord Hanworth also cited *Snell v Heighton*<sup>16</sup> when considering whether appropriation of the 500 tons of wheat had taken place. In that case Grove J. had held there was no appropriation to a sale of 60,000 bricks where the vendor had applied all of his existing stock of 117,000 bricks bar 62,000 to other purposes.

A careful reading of the judgment of Hanworth MR makes it clear that his comments were confined to establishing that there was no specific appropriation of the goods to the extent that was required to bind the goods by equitable assignment. In no way did Hanworth MR indicate that the 1893 Act overruled the traditional equitable approach and there is nothing in the majority reasoning of the Court of

10 Section 16 of the Sale of Goods Act 1893 provides that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are identified.

11 Section 52 of the Sale of Goods Act 1893.

12 *Re Wait*, above n.9 at 610.

13 See *ibid.* at 617.

14 *Hayman & Son v M'Lintock* [1907] SC 936.

15 See *Re Wait*, above n. 9 at 621.

16 *Snell v Heighton* (1883) Cab & Ell 95.

Appeal that would suggest such a *ratio*. At best the case is *sui generis* in that on the facts of the case at hand the equitable doctrine could not apply. But it is not necessarily authority to overrule a previously well-established doctrine.

However, another member of the Court of Appeal in that case, Atkin LJ, did express the view that the 1893 Act had in fact overruled the equitable doctrine. According to Atkin LJ, a contract to sell future goods created no right of property even where the goods could be subsequently identified unless such goods were specifically appropriated to the contract in accordance with the terms of the Act. It was the view of Lord Atkin that goods are ascertained when they are 'identified in accordance with the agreement after [the] contract is made'.<sup>17</sup> This means the goods must be identified by some act of appropriation that takes place after the contract.

It is this view which appears, rightly or wrongly, to have taken hold, within English common law and which also found support subsequently in other common law jurisdictions.<sup>18</sup> In the Canadian case of *Olds Products Co v Montana Mustard Seed Co*<sup>19</sup> the court followed the approach of Atkin LJ in *Re Wait*, confining the buyer to a remedy in damages rather than conferring any property right. In *Olds*, the seller agreed to sell to the buyer mustard seed to be grown in the future. Despite having such seed in stock, he subsequently refused to deliver any to the buyer. The buyer sought an injunction preventing the seller from selling the mustard seed to other buyers. The injunction was refused as the buyer had no property right. He could of course exercise his legal right and seek common law redress in the form of damages.

And herein may lie a small clue possibly as to why this particular equitable doctrine failed in the view of many to survive the 1893 enactment (or similar enactments in other jurisdictions). Despite the fact that the relevant legislative provisions often specifically preserved equitable doctrines to the extent that they were reconcilable with the express legislative provisions, this particular equitable doctrine favours the equitable remedies of injunction and specific performance over the common law remedy of damages. The common law, in contrast with civil law, generally prefers damages as an appropriate contractual remedy.<sup>20</sup> This view is based on the perception that personal remedies, such as specific performance of contractual obligations, are inappropriate in a contractual context. Where a contract is

<sup>17</sup> See *Re Wait*, above n. 9 at 630.

<sup>18</sup> *Re CA McDonald & Co* (1959) 2 CBR (NS) 326; 18 DLR (2d) 731 concerning the sale of shares.

<sup>19</sup> (1973) 37 DLR (3d) 625 (Sask. QB).

<sup>20</sup> *Société des Industries Metallurques v Bronx Engineering Co* [1975] 1 Lloyd's Rep 465; *CN Marine Inc v Stena Line* [1982] 2 Lloyd's Rep 336.

personal in nature, that is, where there is a personal element to performance of the obligations, courts are naturally reluctant to make orders that might look suspiciously like indentured service. *A fortiori*, where contracts are impersonal in nature, any breach can be resolved most appropriately through monetary compensation. In civil law jurisdictions, the emphasis is on personal remedies based on the belief that contracts, irrespective of the nature of their obligations, are essentially personal arrangements between people.<sup>21</sup> In more modern times, law and economics theorists have also argued that personal remedies such as specific performance are more efficient than compensatory awards.<sup>22</sup>

Moreover, some courts have questioned the appropriateness of these restrictions on personal remedies such as specific performance and injunctions even *vis-à-vis* future or unascertained goods. In *Sky Petroleum Ltd v VIP Petroleum Ltd*<sup>23</sup> Goulding J awarded an injunction restraining the defendant from breaking a contract with the buyer for the sale of all the buyer's petroleum requirements for the next ten years. This was effectively an order for specific performance over future goods.<sup>24</sup>

There is no evidence that emphasising compensatory remedies over personal remedies, in cases of breach of contract, has any harmful impact on the operation of commercial activities, and, indeed, such an approach is more reflective of commercial practices. However, failing to utilize remedies of specific performance will, in certain situations, result in an injustice; this is particularly so where one or more of the parties is in default due to insolvency or bankruptcy or where frustration of the contract occurs.

Nonetheless, the views of a single judge of the Court of Appeal, Atkin LJ, have held sway for many years, and it is true to say that there has been subsequent judicial support, albeit *obiter* in nature.<sup>25</sup> Thus, in place of a symbiotic legislative and equitable approach to the buyer's rights in contracts for future or unascertained goods, there exists a single legislative framework based on the cumbersome process of appropriation.

21 T. Ulen, 'The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies' (1984) 83 *Michigan Law Review* 341; J.P. Dawson, 'Specific Performance in France and Germany' (1959) 57 *Michigan Law Review* but cf. H. Lando and C. Rose, 'The Myth of Specific Performance in Civil Law Countries' American Law and Economics Association Annual Meetings 2005, Paper 15 <<http://law.bepress.com/cgi/viewcontent.cgi?article=1014&context=alea>> (accessed 24 August 2006).

22 A. Schwartz, 'The Case for Specific Performance' (1979) 89 *Yale Law Journal* 271.

23 *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954.

24 Although there is merit to the argument that the case refers to a contract for supply rather than a contract for the sale of future goods, see *Re London Wine Shippers Ltd* (1986) PCC 121,149.

25 *Leigh & Sullivan Ltd v Aliakmon Shipping Ltd 'The Aliakmon'* [1986] 1 AC 785, judgment of Lord Brandon of Oakbrook.

### III. Case Law

Contracts for future or unascertained goods therefore require an act of appropriation to identify the goods as those of the contract. Until the identification is made, the contract goods are unascertained. In contracts for portion goods, a two-stage process leads to the specific goods. First, when making the contract the parties must describe the bulk from which they are to be supplied. Secondly, goods having those characteristics must be separated from any bulk and irrevocably appropriated to the contract. Once that has been done the seller loses the right to supply any alternative goods, even if they have all the described properties.

The completion of the first stage of the process is relevant for the purposes of analysing risk and frustration<sup>26</sup> and raises some interesting questions but is insufficient to transfer ownership.

Where the goods are being held by a third party an instruction from the seller to hold those goods on the buyer's behalf may constitute unconditional appropriation. In *Wardars (Import & Export) Co Ltd v W. Norwood & Sons Ltd*<sup>27</sup> the agent of a seller of quasi-specific goods gave the buyer a delivery note entitling him to collect the goods. The buyer went to the place of storage and found the relevant quantity of quasi-specific goods outside the warehouse awaiting collection. He produced the delivery note and loaded the goods. The goods had spoiled for want of refrigeration and the question for the court was when property in the goods had passed. The court held that property passed and the goods were unconditionally appropriated when the delivery note was accepted and the goods on the pavement were confirmed by the storage official to be the contract goods. Harman LJ relied on s. 29(3) of the Sale of Goods Act 1893 in so deciding. Section 29(3) provides that

Where the goods at the time of the sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf.

The risk therefore passed at that time too. As Lord Justice Harman confirmed, 'risk prima facie passes with property'.

Where the seller himself continues to have possession of the goods, he may earmark certain goods sufficiently so that they can be said to have been unconditionally appropriated to the contract. However a court's reluctance to arrive at that conclusion, absent some compelling and conclusive evidence, is clear from the case of *Carlos Federspiel & Co v Charles Twigg & Co*.<sup>28</sup> In that case a bicycle manufacturer had made some bicycles to the order of a purchaser and

26 R. Fitzpatrick, 'Passing of Property' (2004) *Irish Student Law Review*, <http://www.islr.ie/Reviews/2004/passing-of-property.php>.

27 *Wardar's (Import & Export) Co Ltd v Norwood & Sons Ltd* [1968] 2 QB 663.

28 *Carlos Federspiel & Co v Charles Twigg & Co* [1957] 1 L1 L Rep 240.



packed them in boxes bearing that purchaser's name. The bicycle manufacturer became insolvent and the question before the court was whether those bicycles had been unconditionally appropriated to the purchaser. The court held that there had been no appropriation to the buyer. The court considered the marking of the boxes as a selection by the seller of the goods he expected to use in performance of the contract but not as an act demonstrating an intention to attach the contract specifically to those goods.

The differing decisions in the last two cases described indicate that the passing of property can turn on the most trivial of events. The commercial uncertainty and perhaps unintended consequences may not come to light until it is too late for the parties to alter the outcome. In fact in *Wardars* Salmon LJ expresses the view that it 'is perhaps fortunate' that the court did not have to decide whether there was unconditional appropriation to the contract at the moment when the goods were put on to the pavement. While one commentator<sup>29</sup> has called for a change in judicial attitudes to s. 16, it would seem to the authors that unequal or varied interpretations of s. 16 would cause greater uncertainty and that what is required is a legislative amendment.

What is required for 'unconditional appropriation' is the earmarking of particular goods to the contract. Rule 5(2) provides that delivery of the goods to the buyer or to a carrier consigned by the buyer will suffice where no rights are reserved by the seller. However, it is clear from *Healey v Howlett & Sons*<sup>30</sup> that delivery of a quantity of goods to a carrier without identifying a subset of those goods for a specific buyer will not amount to unconditional appropriation. In *Healey v Howlett & Sons* the plaintiff had sent 190 boxes of fish to London from Kerry. The fish had spoiled by the time the cargo arrived in Holyhead, where it was to be divided among several buyers. The defendant had ordered 20 boxes and the court had to decide on the ownership of the fish on its arrival at Holyhead. The owner would bear the loss of the fish. None of the boxes had been marked with the defendant's name and the court held that there was no appropriation to him. Therefore the defendant had not become the owner of the 20 boxes of spoiled fish.

Where a contract is for the sale of quasi-specific goods, the only real difference is that unconditional appropriation can take place without any act of seller or buyer. This can arise from the principle of exhaustion, where the bulk is reduced in some way leaving only the goods described in the contract. The contract goods are thus identified by default. In *The Elafi*<sup>31</sup> Mustill J was heavily influenced by the

29 J. Crinion, 'All that Glitters: Re Wait, Section 16 and the Peril for the Pre-paying Buyer: Is it Time for a Fresh Approach?' (2004) 4 *University College Dublin Law Review*.

30 [1917] 1 KB 337.

31 [1982] 1 All ER at 208.

judgment of Roche J in *Wait and James v Midland Bank Ltd*<sup>32</sup> which acknowledged the possibility of ascertainment by exhaustion and concluded that ascertainment had been achieved 'automatically by the facts'.

Acknowledging that a seller might rearrange goods for his own record-keeping or management purposes, without deciding irrevocably to dispose of certain goods under a certain contract, the courts seek convincing evidence of an unconditional appropriation. The case of *Cronin v IMP Middleton Ltd*<sup>33</sup> must be treated with some reserve as it is a tax case. In that case Carroll J was dealing with the passing of property in unascertained goods and held that s. 18, Rule 1 did not apply. She held that property did not pass when the contract was made. Although the judge described the goods in question as un-specific, she applied s. 17 and held that the goods were ascertained at the time of delivery. She held that property was intended by the parties to pass when the goods were delivered. However, the aim of the Finance (Miscellaneous Provisions) Act 1956 being interpreted was to encourage export and so she held that the Revenue should not be concerned whether property in the goods still vested in the manufacturer.

In *Flynn v Mackin and Mahon*<sup>34</sup> the Supreme Court found there had been no unconditional appropriation of a car which was crashed en route to an agreed delivery and hand-over appointment. The Court stated that nothing in the contract would have prevented the vendor selling the car in question on the way to the appointment and providing an alternative car, of the same model and colour, to the purchaser. The Court held, in spite of the provision to the purchaser of the licence number of the car for the purposes of arranging insurance, that there was no obligation to sell that particular car and so the car had not been unconditionally appropriated to the contract. In light of the Supreme Court also holding that this contract was not covered by the Sale of Goods Act 1893, the comments, to a degree, must be treated as *obiter*.

The apparently unjust consequences of the operation of s. 16 can apply to consumers. In *Re London Wine Co (Shippers) Ltd*<sup>35</sup> the sale of wine to consumers as an investment provided the background to the case. The wine was then stored by the vendor and the purchaser paid storage and insurance costs to the vendor. However, the cases of wine were not earmarked or identified as relating to any particular contract of sale. Rather, all the cases of wine were stored together. The company became insolvent and the customers' subsequent claims failed as the court held that the goods had not been identified with the various contracts of sale and thus had not been ascertained. As

32 [1926] 24 Ll L Rep 313.

33 [1986] 3 *Irish Tax Reports*, 45.

34 [1974] IR 101.

35 1986 PCC 121.

the goods had not been ascertained, s. 16 prevented the passing of property in the wine to the consumers.

The Privy Council Decision in *Re Goldcorp Exchange Ltd* seems to say that the New Zealand equivalent of s. 16 of the 1893 Act could operate in certain circumstances to prevent the passing of legal or equitable title in unascertained goods, regardless of the intention of the parties.

*The Elafi*<sup>36</sup> shows a more flexible and pragmatic approach in that 'ascertained' is given a broad interpretation whereby the goods subject to the contract are ascertained in bulk, without any need for the goods to be physically allocated between separate contracts or for the buyer to nominate which particular goods come from which particular source.

To avoid potential problems with s. 16 it would seem necessary for the goods to be 'ascertained' in some way. The contract could provide for notice of appropriation to be delivered to the buyer but that would jeopardize the smooth running of commerce and involve additional cost.

While satisfying the 'unconditional appropriation' condition can be difficult where one supplier is involved, it becomes really problematic where the goods of two different suppliers are commingled for supply. The difficulty is exacerbated where the goods are gas, oil, wind energy or other commodities incapable of earmarking or distinction. In the event that four petroleum exploration companies drill, extract gas, mix it on an offshore platform and sell it via the same pipeline, how is property to pass from each of the four vendors to the purchaser? Could they meter flow at the entry point between particular dates/times (e.g. dividing 24-hour clock proportionate to shareholding) and thereby create an ascertainable divided share of a particular vendor?

#### IV. English Legislative Amendment

Left judicially unchallenged, apart from the faint-hearted approach in *The Elafi*,<sup>37</sup> it was for the legislature to intervene. The Sale of Goods (Amendment) Act 1995 ('the 1995 Act') altered the position under English law. The 1995 Act inserts ss 20A and 20B and thereby adds a new Rule 5(3) to s. 18 of the Sale of Goods Act 1979, which had repealed the 1893 Act and which could be described as a consolidating Act. The effect of the amendment is to give a buyer an undivided share in the unascertained goods, such share to be proportionate to the amount paid by the buyer pursuant to the contract. This amendment only assists a buyer who has partially or wholly prepaid for the

<sup>36</sup> [1982] 1 All ER at 208 (QBD).

<sup>37</sup> *Ibid.*

goods and only applies to an undivided interest in a bulk or quasi-specific good.

Burns makes the point that the amendment fell far short of the radical changes made in the US by the abolition of reliance on the concept of 'property'.<sup>38</sup> He also explains that the scope of the amendment is likely to have resulted from the lobbying of a particular industry group of commodity traders and hence the amendment was very problem-specific. It is also to be noted that the amendments do not legislate for seller insolvency and the possibility of a shortfall in the undivided bulk.<sup>39</sup>

## V. A Comparative Analysis

### *i. Ireland*

The Sale of Goods Act 1893 contains detailed rules on the passing of property and the timing of this primary objective of a contract for the sale of goods.

While s. 17 provides the basic rule that property in the goods shall pass when the parties to the contract intend it to pass, s. 16 of the Sale of Goods Act 1893 provides that where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are identified. *The identification must, by definition, take place at a later stage—after the making of the contract.* The rule in s. 16 is not subject to any agreement to the contrary made between the parties, rather it is one of mandatory application. This was decided in *Jansz v G.M.B. Imports Pty Ltd*.<sup>40</sup>

While identification establishes which are the contract goods, it does not effect the transfer of property. However, once the goods are thus ascertained, the issue of the passing of property ceases to be problematic because the identification assists the passing of property when the rules in s. 18 are applied. Prior to that act of ascertaining the goods, it could not be said that someone had bought goods if the parties were not in a position to identify which goods had been bought, and sold. This is dictated by common sense, as Lord Mustill stated,<sup>41</sup> when stipulating that there could be no transfer of title to, or property in, goods which cannot be identified. In fact Lord Mustill went further and stated that:

It makes no difference what the parties intended if what they intend is impossible: as is the case with an immediate transfer of title to goods whose identity is not yet known.

<sup>38</sup> T. Burns, 'Better Late than Never: The Reform of the Law on the Sale of Goods Forming Part of a Bulk' (1996) 59 MLR 260.

<sup>39</sup> *Ibid.* at 269.

<sup>40</sup> [1979] VR 581.

<sup>41</sup> *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 90; [1994] 2 All ER 806 at 814 (PC).

Section 16 prevents the transfer of property in goods to the buyer until such time as those goods are ascertained; it is ss 17 and 18 that govern the time at which that property is transferred.

While s. 17 states that property passes when the parties intend it to pass, s. 18 provides a set of presumptions to govern the timing of the passing of property in circumstances where the intention of the parties is not clear. In other words, there may be an express or implied term in the contract to the effect that property will pass at a particular time. (This might be stated to take place when the goods have been delivered or paid for.<sup>42</sup>) In the absence of any contrary provision or intention of the parties, s. 18, Rule 5 of the 1893 Act provides that:

Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied and may be given either before or after the appropriation is made.

The effect of Rule 5 is that an unconditional appropriation is required for the passing of property in the goods. This means that after the act constituting the unconditional appropriation, the contract goods must be capable of being identified and all discretion to substitute them for other goods must have ended.

The question arises as to what constitutes unconditional appropriation. Rule 5 provides an example in so far as it states at subs. (2) that there is unconditional appropriation where goods are delivered to the buyer or to a carrier for transmission to him, without the seller reserving a right of disposal.

In essence therefore the Irish statutory provisions do not benefit even from the limited amendment provided by the 1995 Act in the United Kingdom. It is clear therefore that Irish commercial practice is even more disadvantaged for the prepaying buyer.

## *ii. Canada*

The primary remedy for a buyer in Canadian law is that of damages,<sup>43</sup> though other remedies, which are not irreconcilable with the Sale of Goods Act 1980, are still available in certain situations.<sup>44</sup> Such remedies are available either from common law or equitable doctrines and any attempt to distinguish between the two sets of laws is inappropriate.<sup>45</sup>

Section 52 of the 1980 Act specifically provides for the return of money paid by a buyer where there has been a complete failure of

<sup>42</sup> See *Re Wait*, above n.9.

<sup>43</sup> See G. Fridman, *Sale of Goods in Canada*, 5th edn (Carswell: Toronto, 2004).

<sup>44</sup> Sale of Goods Act RSO 1980 s. 57 (Canada).

<sup>45</sup> *United Scientific Holdings v Burnley British Columbia* [1977] 2 All ER 62 (HL).

consideration. Thus, if the seller fails to deliver goods for which payment has been made, clearly the buyer can pursue an action for money had and received.<sup>46</sup> In *Rowland v Divall*<sup>47</sup> an action for money had and received lay against the seller when the buyer had to surrender possession of the goods to the true owner. Canadian law goes further and includes the doctrine of *error in substantialibus*. Thus in *O'Flaherty v McKinlay*,<sup>48</sup> where the goods consisted of a car which was manufactured in the wrong year from that described, then an action lay against the seller for money had and received even though there was no fraud or deceit on the part of the seller.

Section 50 further provides the courts with a remedy of specific performance where the goods are specific or ascertained, in such circumstances as it sees fit. Considerable emphasis is placed on whether or not the goods are specific or ascertained before such an order will be granted. In *Humboldt Flour Mills Co v Boscher*<sup>49</sup> the seller had contracted to supply the produce from an agreed quantity of seed. However, since the buyer never alleged that there had been any crop from the seed (nor in fact that it had actually ever been planted) the court refused an order of specific performance on the basis that the goods were neither specific nor ascertained. The Law Reform Commission of Ontario formed the view that this restriction was inequitable.<sup>50</sup> It proposed that the legislation be amended to include the following provision:

In an action against the seller for breach of contract to deliver promised goods, whether or not the goods existed or were identified at the time of the contract, the court may direct that the contract be performed specifically and may impose such terms as to damages, payment of the price and otherwise as seem just to the court.<sup>51</sup>

In reviewing the position in other jurisdictions, the Law Reform Commission of Ontario was of the view that while the Uniform Commercial Code (UCC) was preferable to the Canadian legislation, it did not go sufficiently far enough. Its own proposal would considerably extend the protection available to buyers of future or unascertained goods. It is opportune therefore to look at the approach of the UCC at this stage.

### ***iii. United States: Uniform Commercial Code***

Although the English Sale of Goods Act 1893 has been exported in substantial form throughout much of the common law world, this

46 Where a seller fails to deliver goods of the right identity or quality then the buyer may also reject such goods (s. 12(2)) in addition to an action for money had and received.

47 [1923] 2 KB 500 (CA).

48 [1953] 2 DLR 514 (Nld CA).

49 [1975] WWD 14 (Sask. QB).

50 OLRC Report Vol II 436-439.

51 *Ibid.*, Draft Bill ss. 9-18.

obviously did not happen in the United States. Instead American law went its own way, first with the Uniform Sales Act and in more recent times, and far more successfully, with the Uniform Commercial Code. Primarily, the UCC relates to contracts for the sale of goods, or allied transactions. Designed as a model code, it has been adopted in the vast majority of states. Unfortunately, individual state law still governs certain aspects, particularly that relating to personal bankruptcy, which will impact significantly in the sort of transaction that we are concerned with.

Sections 1–201(22) and (23) provide that if insolvency occurs before the seller delivers the contract goods, the buyer is vested with the power to retrieve those goods. When a buyer enters into a contract governed by the UCC, he or she acquires an interest which is known as ‘special property and insurable interest’ in the contract goods. Such interest comes into existence only when the goods are identified to the contract. Section 2–501(1) of the UCC states that goods become identified to the contract by agreement between the parties, or failing such agreement then in the case of existing goods when the contract is made and in the case of future or unascertained goods, when the goods are shipped, marked or otherwise designated by the seller as identified with the contract.<sup>52</sup> Moreover, the section goes on to provide that where a buyer has paid part or all of the price of such goods he or she may, on making a tender of the unpaid portion of their price, recover them from the seller if the seller becomes insolvent within ten days of the first instalment on their price.<sup>53</sup>

However, there are serious limitations on the usefulness of this section. First, it requires that the goods have become identified to the contract since the section requires that the buyer have a special property in the goods.<sup>54</sup> Second, the time period—ten days—within which such rights must be exercised is exceptionally short. Third, and perhaps more damaging of all, is that any such rights under this section are of course subordinate to the rights of the trustee in bankruptcy.

A classic application can be found in the Alabama case of *Re Bonner*.<sup>55</sup> Here the purchaser had a contract for the construction of a fishing vessel with the vendor. At the time the contract was entered

52 Note, however, that Art. 2-501(1)(b) does not apply to contracts relating to crops and livestock which are governed by specific provision of Art. 2-501(1)(c).

53 In the case of goods bought for family, household or personal use such recovery may occur where the seller repudiates the contract or fails to deliver the goods in accordance with the contract, s. 2-502(1)(a).

54 Section 2-501(1); see *Re CSY Yacht Corp* 42 BR 619, 39 UCC 879 (Bankr MD Fla 1984): no special property interest where goods not in existence at time of bankruptcy.

55 <[www.almb.uscourts.gov/Opinions/0530321.pdf#search='Re%20CSY%20Yacht%20Corp%20cour'](http://www.almb.uscourts.gov/Opinions/0530321.pdf#search='Re%20CSY%20Yacht%20Corp%20cour')> (accessed 24 August 2006).

into, the vessel was not in existence, but shortly thereafter work commenced on its construction. Moreover the purchaser had made three substantial instalment payments in the amount of \$138,000 out of a total price of \$230,000. At that point the vendor filed for bankruptcy. The purchaser now sought to establish title to the vessel by way of proving a special property interest, whereas the trustee in bankruptcy sought that it should be disposed of with the proceeds being distributed among all the creditors. While the Alabama court held that the purchaser had established a special property interest in the unfinished vessel through identification, the purchaser failed to show that they had tendered payment within the ten-day deadline. Although the court admitted that the deadline would be difficult to satisfy,<sup>56</sup> it remained the fact that the purchaser produced no evidence of even attempting to tender. Accordingly, the purchaser's claim was denied.

Failing the buyer having recourse to the above provisions, in bankruptcy the buyer loses the option to use state law remedies to retrieve goods.<sup>57</sup> The buyer is an unsecured creditor who must wait their turn for payment (on an unjust enrichment claim) or receipt of the goods (because the item or items in question are not regarded as property of the seller's estate). The bankruptcy court would go to state law to resolve these questions. Thus in *Paoletti*<sup>58</sup> the court held that part payment by the city of Oakland on two fire tenders conferred nothing more on the purchaser than a claim against the bankrupt estate.

Section 2-716(3) provides a buyer with an additional right, essentially the right of replevin,<sup>59</sup> provided that the buyer can establish that after reasonable effort he is unable to effect cover.<sup>60</sup> Cover is defined as the making in good faith, and without unreasonable delay, any reasonable purchase of, or contract to purchase, substitute goods.<sup>61</sup> If the buyer can effect cover then he or she is entitled to damages from the seller for the difference between the price of the cover and that under the contract together with incidental or consequential damages less expenses saved in consequence of the seller's breach.<sup>62</sup> The

56 In *Bonner*, the purchaser would have had to show that the vendor was insolvent ten days from the payment of the first instalment, some two years before the vendor went into bankruptcy! See also *Re Surplus Furniture Liquidators* 199 BR 136, 141 (Bankr MD NC 1995).

57 Section 362(a)(1) BRA.

58 205 BR 251 (Bankr ND Cal 1997).

59 Replevin is simply a judicially ordered recovery of the goods. At common law it was confined to repossession of the goods *in specie*, but the modern formulation also permits repossession of the goods or the value of the goods.

60 Or where the circumstances reasonably indicate that such effort would be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

61 Section 2-712(1).

62 Section 2-712(2).



right of replevin is of course also subject to the rights of the trustee in bankruptcy.

## V. Conclusion

Where a buyer enters into a contract for future goods then in general the true remedy for the buyer in the event of a default by the seller is compensatory in the form of damages. However, where a buyer has prepaid for future goods, a compensatory remedy is unjust where the seller becomes insolvent. Equity had recognized this distinction, albeit perhaps too broadly. In *Re Wait*, certain contracts involving bills of lading were held to be ineffective to pass the legal title in part of an undivided whole to a purchaser because there was insufficient appropriation of the unascertained goods. The majority of the Court of Appeal agreed with that proposition and Atkin LJ formulated it in terms of the new legislative environment post 1893, denying any residual equitable jurisdiction as incompatible. In truth, however, the 1893 Act can never have been intended to overturn this doctrine in its entirety, but the lack of any subsequent judicial challenge to the reasoning of Atkin LJ in *Re Wait*, with its exclusionary approach to the application of the Act, had resulted in a *de facto* abolition of the eminently sensible equitable doctrine. In its place, the requirement of unconditional appropriation has been added in order to secure the passing of property.

On the other side of the Atlantic in the United States, the Uniform Sales Act originally governed the allocation of risk of loss in contracts for the sale of goods. The approach of the Uniform Sales Act was based on title. Risk of loss lay with whoever had title to the goods. Unfortunately determining title was not an easy question. As Llewellyn put it:

My brother Bacon has taught sales law for 28 years. When he says it isn't too difficult to determine where the court will decide the title is or is going to be or should be, he is speaking a truth within limits for people who have taught sales law for 28 years.<sup>63</sup>

The adoption of the Uniform Commercial Code essentially swept away the use of title in allocation of risk of loss situations. Article 2 of the UCC now covers contracts for the sale of goods. It is open to the parties to make their own agreement as to where the risk of loss should lie. Thus, finally Llewellyn's commentary can be put to rest, though for those not given to pre-emptive decision-making, the legislative default provisions provide cold comfort.

Canadian jurisprudence likewise has moved cautiously away from the turgid reading of the statutory provisions on sales law in England

<sup>63</sup> Taken from: J. White and R. Summers, *Uniform Commercial Code*, 4th edn (West Publishing: St Paul, MN, 1995) 229

and Ireland. There the Ontario Law Reform Commission has recommended a sensible and reasonable change of limited import. This is predicated upon more reasonable case law. It is suggested that the time has come for the Irish legislature to accept the inadequacies of the English approach to this issue and to move towards the proposals from the Canadian Law Reform Commission.